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8 Attorney for Defendant Josef F. Boehm

9 IN THE UNITED STATES DISTRICT COURT

10 DISTRICT OF ALASKA

11
12 Sally C. Purser,)
13 Plaintiff,) POINTS AND AUTHORITIES TO
14 v.) CONTINUE THE TRIAL DATE
15 Josef F. Boehm, Allen K.)
Bolling, and Bambi Tyree,)
16 Defendants.)
17)
18) CASE NO.: A05-0085 (JKS)
19)

20 I. PRIOR TO THIS COURT'S SCHEDULING ORDER, DEFENDANT BOEHM'S
21 ATTORNEYS COMMITTED TO DATES IN ANOTHER CASE WHICH ARE IN
22 CONFLICT WITH THIS COURT'S AUGUST 14th TRIAL DATE.

23 Defense Counsel are representing two clients in the matter of
24 the *People of South Dakota v. John Midmore*, a criminal case in
25 South Dakota. See Case Number 16F06000125A0. This case involves
26 conspiracy to commit first degree murder, aiding and abetting, and
27 commission of a felony while armed with a firearm. The two
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1 defendants are currently incarcerated and have both been
2 incarcerated for over 8 months.

3 The trial in South Dakota was originally set for June 4, 2007.
4 However, all events were stayed in the case due to an interlocutory
5 appeal filed by the people. Prior to this court's scheduling
6 order, the Honorable Judge John J. Delaney set the following dates
7 in the South Dakota case: (1) substantive motion deadline of July
8 31, 2007, (2) response deadline August 10, 2007, (3) motion hearing
9 on August 17, 2007, in South Dakota and (4) trial date of September
10 24, 2007. The trial is expected to run from 4-6 weeks. Counsel is
11 likely to take 3 to 4 trips to South Dakota prior to trial and will
12 setup for trial and stay there on a permanent basis starting
13 September 12, 2007. In addition, the August 17th motion hearing
14 date falls during the same time the Boehm case is set for trial
15 making it impossible for counsel to be in two places at one time.

16 The scheduled dates in the *Midmore* matter are in direct
17 conflict with this courts scheduling order and will not allow
18 Defense counsel for Boehm to adequately prepare for trial in
19 Alaska. Further, it is impossible for counsel to be in two places
20 at one time.

21
22 **II. DEFENDANT BOEHM'S PRISON HAS BEEN IN LOCKED DOWN AND REMAINS**
23 **IN LOCK DOWN UNTIL AN UNDISCLOSED DATE MAKING IT IMPOSSIBLE TO**
24 **BE PREPARED ON THE ORDERED TRIAL DATE.**

25 Defendant's attorneys have been trying to prepare diligently
26 for trial. Their efforts have been significantly hindered due to
27 the past and current lock downs at the Victorville Federal
28

1 Corrections Facility. The current lock down has been in process
2 for over a month and there is no current estimate of when the lock
3 down will cease. This lock down has made any communication
4 impossible between Counsel and Defendant Boehm.

5 In order to properly prepare for trial, counsel must have
6 access to his client. Due to the current lock down at the
7 Victorville Federal Corrections Facility, the current dates for
8 trial will not allow counsel enough time to prepare .

9 **III. UNDER WELL ESTABLISHED NINTH CIRCUIT CASELAW, A CONTINUANCE OF**
10 **THE TRIAL DATE IS WARRANTED HERE.**

11 Whether to grant or deny a motion to continue a trial date is
12 a question of discretion. In exercising that discretion, the court
13 must address four factors: (1) the extent of the defendant's
14 diligence; (2) the need or usefulness for the continuing the trial;
15 (3) the inconvenience to the court and witnesses; and (4) the
16 prejudice to the defendant if the continuance is not granted.
17 *United States v. Mejia*, 69 F. 3rd 309, 314 - 318 (9th Cir. 1995).
18 The weight accorded to each factor may vary from case to case.
19 *Id.*, at 314. However, the prejudice to the defendant if the court
20 refuses to grant the continuance is the "most critical question."
21 *Id.*, at 316.

22 Under the four *Mejia* factors, a continuance of the August 14th
23 trial date is certainly warranted. Defense counsel have certainly
24 been diligent in preparing for trial. Counsel have reviewed
25 approximately 30,000 pages of discovery. Counsel have also
26 reviewed hundreds of hours of audio and video interviews. They are
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1 familiar with both the factual and legal issue likely to arise at
2 trial. However, the very nature of the defense changed in just the
3 last few weeks when Tyree became a plaintiff witness. Thus, much
4 of the preparation counsel had done became irrelevant and counsel
5 had to begin again to prepare for trial.

6 Certainly, the need for continuing the trial date is very
7 great. Without additional time, the defense will not be fully
8 investigated. The presentation of such a undeveloped defense at
9 trial may result in the defective assistance of counsel. Such an
10 undesirable result should be avoided at all costs.

11 The defense is unaware of any inconvenience which a
12 continuance of the trial date would cause. The plaintiff has not
13 stated why a continuance would prejudice his client so it is
14 unlikely that the continuance will cause any inconvenience to the
15 plaintiff or her witnesses. The request is being well enough in
16 advance of the trial date so that it is likely that any potential
17 inconvenience will be mitigated.

18 Prejudice to the defendant is, of course, the paramount
19 consideration in determining whether a trial date should be
20 continued. Certainly, as the above discussed facts amply
21 demonstrate, without the requested continuance, counsel for Boehm
22 will not be able to present a fully developed defense at trial.
23 The presentation of an undeveloped defense would certainly result
24 in a denial of the Boehm's right to the effective assistance of
25 counsel. This, in turn, could lead the Court to have to declare a
26 mistrial during trial. All of these problems could be avoided by
27 continuing the trial date.
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1 **IV. CONCLUSION**

2 For the above stated reasons, Defense Counsel respectfully
3 requests to continue the trial date to January 15, 2008 and all
4 other dates respectively.

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6
7 Respectfully submitted,

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11 DATED: May 18, 2007

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